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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICK DALE CABRAL,

Defendant and Appellant.

F057388

(Super. Ct. Nos. MCR11720 &  
MCR026157B)

**OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Mitchell C. Rigby, Judge.

Alison E. Kaylor, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a probation revocation hearing, the trial court found that defendant Rick Dale Cabral violated the terms of his probation by knowingly possessing ammunition as a convicted felon. On appeal, defendant challenges (1) the timeliness of the probation violation petition and (2) the sufficiency of the evidence to support the revocation of his probation. We will affirm.

### **PROCEDURAL SUMMARY**

Defendant was on felony probation in two cases. On December 4, 2007, ammunition was found during a probation search of defendant's residence. On September 4, 2008, nine months after the search, a probation revocation petition was filed, alleging defendant possessed ammunition and marijuana. At the revocation hearing on January 16, 2009, the trial court found that defendant possessed the ammunition, a violation of Penal Code section 12316, subdivision (b)(1).<sup>1</sup> The court revoked defendant's probation and sentenced him to the previously imposed term of three years eight months.

### **FACTS**

#### ***Prosecution Evidence***

At the probation revocation hearing, an officer testified that on December 4, 2007, based on reports of explosions coming from the area of defendant's house, the officer performed a probation search of the residence. Defendant and his wife, Antoinette, lived in the house with their two children. The entire house was a cluttered mess. In the kitchen, on a shelf or in a cupboard, the officer found marijuana, ammunition, and firecrackers. The officer could not remember whether the items were in plain view. When the officer asked defendant about the ammunition, he responded that he knew he had "stuff" there and when he located it, he threw it away. He said he knew he was not

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

allowed to possess the ammunition as a convicted felon, and that was the reason he threw it away when he found it.

### ***Defense Evidence***

Antoinette testified that the marijuana was hers. She smoked it occasionally to help relieve her anxiety at night. She kept the marijuana secret from defendant because he could not tolerate the smell of it and because he was on felony probation. She kept some of it on the shelf in the kitchen, about 10 feet above the floor, away from the children's reach. She considered that shelf the "hands-off shelf"; she had to stand on a stool to reach it. Her former roommate had also kept his medication on the shelf.

Antoinette had been told that the officer found ammunition on the kitchen shelf in a stack of bowls in the back corner. She had not been aware there was ammunition in the house. When defendant was incarcerated, she had gathered up everything that resembled ammunition, anything related to firearms, and any other illegal items, and given it to defendant's employer, who was a gun collector. Antoinette could think of no reason that a guest in her house would put ammunition or marijuana on the kitchen shelf.

Roger Bankston often babysat defendant and Antoinette's children. One day in August 2007, when defendant was incarcerated, Roger was in the kitchen making lunch and the children were outside playing. Defendant's daughter ran into the house with some firecrackers and some bullets, and said, "Look what we found." Bankston took the firecrackers and bullets and put them into a bowl that was on the back of the kitchen shelf. To reach the shelf, he opened a lower cabinet and stepped up onto a shelf. As a convicted felon, Roger knew he was not supposed to possess ammunition, but he felt he had to take it from the children. He did not tell Antoinette about the ammunition because she was already too stressed out.

### ***The Court's Ruling***

The trial court found Antoinette credible, and noted that she took full responsibility for the marijuana, but none whatsoever for the ammunition. The court found that defendant did not possess the marijuana.

The court, however, did not believe Roger's testimony that as a convicted felon, he simply put the ammunition on the shelf without informing Antoinette. The court decided that if Roger was not credible and if Antoinette knew nothing of the ammunition, then it was likely that defendant was the person who had put the ammunition on the shelf. Furthermore, defendant told the officer he knew he had ammunition in the house and he threw it away when he found it. The court believed that if defendant was aware that he possessed ammunition, he had the responsibility of finding it and getting rid of it. The court found by a preponderance of the evidence that defendant had willfully violated the terms of his probation by possessing ammunition.

### **DISCUSSION**

#### ***I. Timeliness of Probation Revocation Petition***

Defendant contends his due process rights were violated because he was prejudiced by an unreasonable nine-month delay between the December 4, 2007 probation search of his house and the September 4, 2008 filing of the probation revocation petition. He maintains that his failure to object to the delay did not forfeit his claim on appeal.

In the context of a criminal prosecution, “[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.]” (*People v. Catlin* (2001) 26 Cal.4th 81, 107.) “[P]rejudice may be

shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.’ [Citation.]” (*Ibid.*)

However, like parole revocation, probation revocation is not a part of a criminal prosecution, and “the full panoply of rights accorded a defendant in a criminal trial are not required in parole and probation revocation hearings ....” (*People v. Cambitsis* (1980) 101 Cal.App.3d 141, 144; *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781-782 [same due process guarantee applies to revocation of probation as to revocation of parole; revocation not part of criminal prosecution].) There are no statutory time limits on when a revocation hearing must be held, and due process requires only that the revocation hearing be held within a reasonable time after a parolee or probationer has been taken into custody. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 488; *Gagnon v. Scarpelli*, *supra*, at p. 782; see also § 1203.2, subd. (b).) Furthermore, the right to a timely revocation hearing can be forfeited when a parolee or probationer charged with violations sits idly by and complains only after proceedings have been concluded adversely to him. (*In re La Croix* (1974) 12 Cal.3d 146, 156.)

In this case, we believe defendant has forfeited his claim by failing to object below. But we also conclude his claim fails on the merits: defendant must affirmatively show prejudice to establish any such due process violation, and this he cannot do.

Defendant asserts that he was prejudiced by the delay because the officer could not remember whether the ammunition was in plain view. Specifically, defendant argues:

“The officer’s lack of recall prohibited [defendant] from proving to the court the location where the ammunition was found. If it was found in plain sight, that would support a prosecution argument that [defendant] knew of its presence. But, if it was located in the back of a cabinet, unable to be easily seen, it is less likely that [defendant] knew it was there.”

This argument misses the point. Although the officer could not remember whether the ammunition was in plain view, the remaining evidence strongly suggested that it was *not*. Defendant admitted to the officer that he knew there was ammunition in the house

and he disposed of it when he found it. Antoinette, whom the trial court expressly found credible, lived in the house and was not aware that the ammunition was on the 10-foot-high shelf. She had been told the ammunition was found inside a bowl on the shelf. Despite this evidence, the trial court reasonably determined that defendant knew he possessed ammunition and had the responsibility to find it and dispose of it. Accordingly, had the officer testified that he remembered the ammunition was not in plain view, it would have had no impact whatsoever on the outcome. As a result, defendant has not shown he was prejudiced by the delay in the proceedings.

## ***II. Sufficiency of the Evidence***

Defendant also contends the evidence was insufficient to support the finding that he violated probation because there was no evidence he knew the ammunition was present.

The trial court may revoke probation at any time during the probationary period if it has reason to believe the probationer has violated any of the probation conditions. (§ 1203.2; *People v. McGavock* (1999) 69 Cal.App.4th 332, 338-339; *People v. Johnson* (1993) 20 Cal.App.4th 106, 110.) “The standard of proof required for revocation of probation is a preponderance of evidence to support the violation. [Citation.] Trial courts are granted great discretion in deciding whether or not to revoke probation. [Citation.] ‘Absent abuse of that discretion, an appellate court will not disturb the trial court’s findings.’ [Citation.]” (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965.)

Here, the probation violation was based on defendant’s prohibited possession of ammunition in violation of section 12316, subdivision (b)(1), which required proof by a preponderance of the evidence that defendant, a convicted felon, possessed (or owned or had under his custody or control) ammunition, and that he knew he did. (§ 12316, subd. (b)(1); see CALCRIM No. 2591.) Defendant’s knowledge of the ammunition’s presence was established by evidence that he admitted to the officer that he knew ammunition was in the house. (*People v. Clark* (1996) 45 Cal.App.4th 1147, 1156

[defendant's admission to officer on day of search that he knew shotgun was in motorhome was sufficient evidence to prove he had knowledge of shotgun's presence in motorhome and to support conviction of being felon in possession of firearm].) And, as the court concluded, the evidence supported the finding that defendant was the person who put the ammunition on the shelf in the kitchen. Sufficient evidence supported the violation, and the trial court did not abuse its discretion in revoking defendant's probation.

**DISPOSITION**

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Hill, J.